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Supreme Court, U.S.
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No. 99-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

VANESSA ARMSTRONG,
Petitioner,

v.

ACCREDITING COUNCIL FOR CONTINUING EDUCATION AND TRAINING, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 2, 1999

35 pp

QUESTIONS PRESENTED

Do federal laws concerning the federal student loan program, 20 U.S.C. §§ 1071 *et seq.*, preempt state consumer protection laws that permit a borrower to raise misconduct by the seller as a defense against repayment of a loan that has been arranged by the seller for the lender?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Vanessa Armstrong, a former student of NBS Automotive School, a for-profit vocational school operated by Market Tire Educational Services, Inc., in the District of Columbia. Petitioner was plaintiff and appellant in the proceedings below. Defendants-appellees were Secretary of Education Richard Riley, in his official capacity as reinsurer of petitioner's loan under the Higher Education Act of 1965; Bank of America NT&SA, a California corporation that purchased petitioner's guaranteed student loan as trustee; California Student Loan Finance Corporation, a California corporation organized for the purpose of purchasing student loans under the Higher Education Act ; and the Educational Credit Management Corporation, a Minnesota corporation that is the assignee of the guaranty for petitioner's loan under 20 U.S.C. §§ 1078, 1085(j), which was originally held by the Higher Education Assistance Foundation, Inc., a Minnesota corporation.

The Accrediting Council for Continuing Education & Training, Inc., a Virginia corporation which was formerly known as the "Council for Noncollegiate Continuing Education" or "CNCE," was a defendant in the proceedings below but was not a party on appeal because the claims against it arose under a separate cause of action that was settled in the district court.

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OPINIONS BELOW

The opinion of Court of Appeals for the District of Columbia Circuit is reported at 168 F.3d 1362, and was amended at 177 F.3d 1036. The opinion and amendment are reprinted in the Appendix to this petition at pages 1a-22a. The decision of the District Court for the District of Columbia is reported at 980 F. Supp. 53, and is reprinted in the Appendix at pages 23a-58a.

JURISDICTION

The judgment of the District of Columbia Circuit was entered on March 6, 1999. A timely petition for rehearing was denied on June 4, 1999. *See* Appendix at 20a. This Court has jurisdiction over both cases under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Truth in Lending Act, 15 U.S.C. § 1603(7), the Higher Education Act of 1965, 20 U.S.C. §§ 1077, 1078, the Federal Trade Commission Rule on Preservation of Consumer Claims and Defenses, 16 C.F.R. Part 433, student loan regulations, 34 C.F.R. §§ 682.200, 206, and D.C. Code 28-3809, the are set forth in the Appendix, 59a- 71a.

STATEMENT OF THE CASE

Last year, over fourteen thousand actions were filed in the federal courts to collect on loans issued under the federal student loan program. The number of student loan cases in the federal courts nearly tripled from 1996 to 1998, and has increased twelve-fold since 1995.[1] These cases now represents 60% of the civil cases brought by the United States. *Id.* at 26. In addition to these federal suits, private loan holders bring actions in state court, and federal agencies conduct

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[1]Federal Judicial Center, 1998 Judicial Business of the United States Courts, 145, Table C-2A.

administrative proceedings to collect loans by intercepting tax refunds or garnishing borrowers' salaries.[2]

In a significant portion of these proceedings, the borrowers allege that the loan was procured through fraud by the school that received the loan proceeds. Under state common law and statutes, these allegations are a defense or set-off to collection. For years the federal courts have struggled with the question of whether the Higher Education Act preempts these state defenses but have been unable to reach any consensus on the issue. Although the courts have almost uniformly concluded that federal law leaves the enforceability of these loans to state law, they are divided on the question of whether federal law preempts state laws that recognize defenses when schools arrange loans for lenders.

In the decision below, the District of Columbia Circuit held that federal law implicitly preempted these state law defenses because federal authorities decided that a Federal Trade Commission rule that provides protection similar to these state laws should not be enforced with respect to these student loans. This decision is contrary to *Puerto Rico Consumer Affairs Dep't v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988), in which this Court held that state law is not preempted merely because federal authorities have decided that comparable federal laws should not remain in effect. Moreover, this Court's decisions make clear that preemption requires "actual conflict" between federal and state law, and such conflict does not exist merely because there is no federal standard in effect governing the conduct addressed by state law. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995).

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[2] *See* 20 U.S.C. § 1095a (authorizing Secretary and guaranty agencies to issue orders garnishing wages); 31 U.S.C. § 3720A (authorizing the Secretary and guaranty agencies to collect on the loans by having the Internal Revenue Service withhold tax refunds owed to borrowers).

This Court should grant certiorari because the District of Columbia's ruling is inconsistent with this Court's preemption rulings, and in conflict with the Seventh Circuit's opinion in *Veal v. First American Savings Bank*, 914 F.2d 909 (1990), which states that state law defenses are not preempted by the Higher Education Act.

A. The Guaranteed Student Loan Program.

The Guaranteed Student Loan Program ("GSLP") is a incentive program established by the Higher Education Act of 1965, 20 U.S.C. § 1071-1146a ("HEA"). *See* 34 C.F.R. § 682.100 (1992).[3] Under the GSLP, the federal government encourages lenders to make loans for student tuition, fees, and expenses by paying interest subsidies and reinsuring the lenders' losses in the event of default, provided that certain federal requirements are met. *See* 20 U.S.C. §§ 1078, 1087-1. The value of the loans issued annually under the GSLP has steadily grown from approximately $9 billion in 1986, to almost $20.5 billion in 1998.[4]

Approximately 20-30 percent of all GSLP loan funds have gone to proprietary and vocational schools offering relatively short term programs (six months to a year) in trades or job skills.[5] Investigations into the GSLP program have repeatedly found that many vocational schools have engaged in

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[3] In 1992, the GSLP was renamed the "Federal Family Education Loan Program." Pub. L. No. 102-325, § 411, 106 Stat. 510 (1992). The Circuit Court's opinion it used the name of the program when the loans at issue were made, Appendix at 2a n.*, and we follow the same practice in this petition.

[4] The College Board, *Trends in Student Aid: 1982 to 1992* at 4, Table 1 (Sept. 1992).

[5] *Id.* at 3, 9, Table 6.

fraud or other abuses to induce students to sign GSLP loans.[6] Many of the students enrolled in vocational schools are unable to repay their loans. For example, in 1987, the loan default rate for students at vocational schools was 39%, in contrast to a 10% default rate for borrowers at four year schools.[7] Numerous suits have been filed by former students challenging the enforceability of GSLP loans arranged by such vocational schools.[8]

The schools accused of fraud in these cases typically worked with lenders to market loans to students. The HEA permits lenders to use schools as their agents for marketing loans, but does not require that they do so. All schools participating in the loan program must disseminate information on federal financial assistance programs, 20 U.S.C. § 1092(a) (1988), and provide a "statement" or "certification" verifying the student's enrollment and financial needs. *Id.* § 1078(2)(a)(i); 34 C.F.R. § 682.603 (1988). Schools may choose to become more involved in the loan making process by referring students to particular lenders or by performing tasks

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[6] *Abuses in Federal Student Aid Programs, Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 101st Cong., 2d Sess., S. Hrg. 101-659, Pt. 2, 153-58 (1990); Office of Inspector General, U.S. Department of Education, SEMIANNUAL REPORT TO CONGRESS, No. 22, October 1, 1990-March 31, 1991, at 9-23.

[7] *Abuses in Federal Student Aid Programs*, S. Rep. 102-58, 102d Cong., 1st Sess. 2 (1991); General Accounting Office, *Analysis of Student Default Rates at 7,800 Postsecondary Schools*, GAO/HRD-89-63BR, at 15 (July 1989).

[8] *See, e.g., Tipton v. Secretary of Education*, 768 F. Supp. 540 (S.D.W.Va. 1991); *Keams v. Temple Technical Institute, Inc.*, 807 F. Supp. 569 (D. Ariz. 1992); *Williams v. National School of Health Technology, Inc.*, 836 F. Supp. 273 (E.D. Pa. 1993); *Bogart v. Nebraska Student Loan Program*, 313 Ark. 656, 858 S.W.2d 78 (1993).

in the loan-making process normally performed by lenders, such as completing and having the borrower sign the promissory note. *See* 34 C.F.R. § 682.206(a), (b). However, if the lender has the school perform "substantial functions or responsibilities normally performed by lenders before making loans," student loan regulations provide that the school is considered to have "originated" the loan. *Id.* § 682.200(b). Since 1976, the student loan regulations have singled-out school-originated loans for special treatment by limiting lenders' ability to rely on representations by schools that originate loans on their behalf. *See id.* § 682.206(a)(2). While the origination regulations permit lenders to delegate loan making responsibilities to schools, they also indicate that "such a practice is discouraged." 41 Fed. Reg. 4499-4500 (1976).

Neither the HEA nor the regulations define the defenses that may be raised on GSLP student loans. The statute contains several provisions expressly preempting state laws on specified issues, such as usury laws, 20 U.S.C. § 1078(d), infancy defenses, statute of limitations, and limits on recovery of collection costs. *Id.* § 1091a. It does not, however, purport to displace state law on other issues. The Department of Education has consistently maintained that federal law does not "occupy the field" with respect to student loans, but leaves issues concerning the defenses that may be raised to state law, unless state law is in actual conflict with federal law. *See Tipton v. Secretary of Education*, 768 F. Supp. 540, 543 (S.D.W.Va. 1991) (*quoting* Department of Education brief); *accord Jackson v. Culinary School of Washington*, 788 F. Supp. 1233, 1248 n.9 (D.D.C. 1992), *rev'd on other grounds*, 27 F.3d 573 (D.C. Cir. 1994), *vacated*, 115 S. Ct. 2573 (1995), *on reconsideration*, 59 F.3d 354 (D.C. Cir. 1995) (rejecting field preemption claim); *Keams v. Tempe Technical Instit., Inc.*, 807 F. Supp. 569, 573-78 (D. Ariz. 1992), *rev'd on other grounds*, 39 F.3d 222 (9th Cir. 1994) (same). In 1992, both Congress and the Secretary of Education considered proposals that would

preempt state laws that allow borrowers to raise the misconduct of schools as a defense to enforcement of a student loan. *See* H.R. Rep. No. 447, 102d Cong., 2d Sess. 508 (1992); 57 Fed. Reg. 60,304 (1992). Neither of these proposals, however, was adopted. *Id.*

B. State and Federal Laws Protecting Borrowers From Fraud By Sellers Arranging Financing.

Student loan borrowers who allege that they have been defrauded by schools marketing loans for lenders have sought to raise the schools' misconduct as a defense to repayment under state common law and consumer protection statutes. State common law generally provides that, where a seller acts as agent for a lender in arranging financing to pay for the seller's goods or services, the lender may be held responsible for misrepresentations made by the seller to secure the sale. *See, e.g., Calvert Credit Corp. v. Williams*, 244 A.2d 494, 496 (D.C. 1968); J. Alperin and R. Chase, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION § 599 at 319-21(1986)(describing major cases). In addition, consumer protection statutes in many states provide that, if a seller and lender cooperate in arranging consumer loans, the lender is subject to claims and defenses arising from the seller's misconduct in the underlying transaction, at least up to the loan amount. *See, e.g.*, D.C. Code 28-3809 (lender subject to defenses arising from consumer sales); J. Fonseca, HANDLING CONSUMER CREDIT CASES, § 2.18-20, at 69-84 (3d ed. 1986) (describing state law protections); Hudak & Carter, *The Erosion of the Holder in Due Course Doctrine; Historical Perspective and Development - Part II*, 9 UCC L.J. 235, 243-60 (1976) (surveying state legislation). These laws prevent lenders and sellers who jointly arrange financing from using the holder-in-due course rule or loan provisions to "cut off" defenses arising from the sellers' misconduct. Instead, state

law generally provides that, if the seller steered the borrower to the lender, the lender cannot assert that the loan is a separate contract and the borrower is required to repay the loan even if the sale was induced by the seller's fraud.

This principle was incorporated into federal law in 1975 when the Federal Trade Commission ("FTC") adopted a trade rule on "Preservation of Consumers' Claims and Defenses" or "Holder Rule." The Holder Rule provides that, if a for-profit seller and lender are related by a business arrangement, or if there is a referral from the seller, the loan must include a Notice stating that the holder is subject to all claims and defenses that the borrower has against the seller. *See* 16 C.F.R. § 433.2 (1999). The Notice becomes part of the loan contract, enforceable under state contract law, so that when the lender (or its assignee) seeks repayment of funds paid to the seller, it "stands in the shoes of the seller," and cannot collect for goods or services that were never delivered or were sold through fraud. *See* 41 Fed. Reg. 20023 (1976). State laws and the FTC Holder Rule are based on the determination that allowing lenders to "cut-off" consumer defenses is unfair, and that lenders are in the best position to prevent and seek redress for misconduct by sellers who act on their behalf. *See* 40 Fed. Reg. 53,506, 53523-24 (1975); Note, *Direct Loan Financing of Consumer Purchases*, 85 Harv. L. Rev. 1409, 1413 (1972).

The Department of Education has warned, in policy statements and regulations, that student loans may be subject to defenses based on the school's misconduct when the school acts as the lenders' agent or "originates" the loan.[9] Federal

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[9] Letter of Acting Assistant Secretary Kenneth D. Whitehead to Hon. Stephen J. Solarz, May 19, 1988, quoted in *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 584-85 (D.C. Cir. 1994); *see also* 34 C.F.R. § 682.604(f)(2)(iii) (providing that students should be counseled that they

(continued...)

authorities have also stated that student loan holders may be subject to claims and defenses based on the school's misconduct even where the school's involvement in loan making was not extensive enough to constitute an "origination" relationship. In 1976, the Office of Education issued a memorandum notifying all lenders and educational institutions that federal student loans must comply with the recently promulgated FTC Holder Rule. Appendix at 75a-79a. Consequently, the notice advised that, when private, for-profit schools refer students to lenders, or have an formal or informal business arrangement with lenders, student loans must include the Notice set forth in the Holder Rule to make holders of the loan subject to claims or defenses arising out of fraud or other misconduct by the school. *Id.* at 77a.

However, by 1990 a controversy had developed over whether 1982 Amendments to the Truth in Lending Act ("TILA") exempted student loans from the FTC Holder Rule. The FTC Holder Rule was adopted pursuant to the Federal Trade Commission Act, but the Rule borrows the definition of "Finance Charge" in the TILA to identify transactions involving the extension of credit. *See* 16 C.F.R. § 433.1(d) (Holder Rule covers transactions where "[a] cash advance which is received by a consumer in return for a 'Finance Charge' within the meaning of the [TILA]"). "Finance Charge" is defined as interest or any other "charge payable directly or indirectly by the consumer" as a cost of credit, 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4. In 1982, Congress exempted student loans from the TILA. *See* 15 U.S.C. §

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[9](...continued)
cannot raise school-related defenses on a loan, "other than a loan made or originated by the school"); 55 Fed. Reg. 48327 (1990) (describing "longstanding view" that if an origination relationship exists, the school's failure to deliver services provides the student a defense).

1603(7), *as amended by* Pub. L. 97-320, title VII, § 701(a), 96 Stat.1538 (1982). This exemption was introduced "to eliminate duplicative paperwork" because the Higher Education Act requires disclosures similar to those required by the TILA. *See* 20 U.S.C. § 1083(a); S. Rep. No. 536, 97th Cong., 2d Sess. 42, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3096 (discussing § 701 of S. 1720 which became § 701 of Pub. L. 97-320). These Amendments did not alter the TILA's definition of "Finance Charge." Nonetheless, in April 1990, an FTC staff member, citing the 1982 Amendments, wrote a letter to a private attorney stating that the FTC "staff's current enforcement position" is that student loans are not covered by the FTC Rule. Appendix at 81a. In September 1990, the Seventh Circuit issued a decision stating that student loans are exempt from the FTC Holder Rule. *Veal v. First American Savings Bank*, 914 F.2d 909, 914 (7th Cir. 1990).

In the meantime, in June 1990, the FTC staff member retracted the letter he had written just two months earlier, stating that it appeared to be based on an "incorrect" premise and the Commission staff wanted a "chance to thoroughly research the issue." Appendix at 82a. In 1991 and again in 1993, the FTC staff issued opinion letters rejecting the argument that the 1982 TILA Amendments exempt student loans from the Holder Rule. *Id.* at 84a-94a. In doing so, the FTC staff expressly rejected *Veal*, which had not offered any analysis to support its assertion that student loans are exempt from the FTC Holder Rule. *Id.* at 90a-91a.

In 1993, the Department of Education also embraced the view that the protections of the Holder Rule apply to student loans. Beginning in 1994, all lenders were required to use a standard promissory note form prescribed by the Department of Education. *See* 20 U.S.C. § 1082(m)(1). When

the Department developed the standard form in 1993, it rejected arguments that the language of the Holder Rule should not be included in the note and, instead, mandated that all student loan forms contain a clause stating that, if the proceeds of the loan "are used to pay tuition and charges of a for-profit school that refers loan applicants to the lender or that is affiliated with the lender by common control, contract or business arrangement," any holder of the loan "is subject to all claims and defenses" that the borrower could assert against the school. *Id.* at 6a-7a.

C. The Decision Below.

Petitioner Vanessa Armstrong enrolled in a vocational school, NBS Automotive School in the District of Columbia, which she alleges engaged in misrepresentation to induce her and other students to enroll. Petitioner further alleges that the school arranged her student loan for her lender by handling all communications with petitioner concerning the loan; the school prepared her loan application, specified the type of loan, determined the loan amount, selected the lender, presented the loan agreement to her for signature, and forwarded the promissory note and loan agreement to the lender. Appendix at 8a.

NBS filed for bankruptcy in 1990. In 1991, plaintiff Armstrong brought a separate action against the parties claiming a right to enforce her NBS loan, with jurisdiction arising under 28 U.S.C. §§ 1331 and 1367, and 20 U.S.C. § 1082(a)(2). She alleged that she and other students were entitled to raise NBS's fraud as a defense to enforcement of the student loans because of NBS's role in originating the loans.[10]

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[10] Plaintiff alleged that the school misrepresented that it was properly accredited and brought a class claim against the school's accrediting agency for misrepresenting the school's accreditation. In response to the accrediting agency's motion for summary judgment, the district court found

(continued...)

More specifically, Armstrong relied on a District of Columbia statute which provides that "[a] lender who makes a direct installment loan for the purpose of enabling a consumer to purchase goods or services is subject to all claims and defenses of the consumer against the seller if" the lender "acts at the express request of the seller" and "the seller participates in preparation of the loan instrument." D.C. Code § 28-3809(a). Petitioner Armstrong also presented alternative theories for preserving these defenses, but these theories are not at issue here.

In a 1993 opinion the district court concluded that relief under the District of Columbia statute is preempted because federal law permits schools to perform loan making functions when they "originate" the loan, and applying the District's statute would attach liability to "functions that clearly are contemplated by the HEA." *Armstrong v. Accrediting Council for Continuing Education and Training*, 832 F. Supp. 419, 430-31 (D.D.C. 1993)). On appeal, the Circuit Court vacated the judgment and remanded the case for the district court to expressly consider whether it should exercise jurisdiction over the pendent state law claims since petitioner's claim under federal law had been dismissed on other grounds. 28 U.S.C. § 1367(c). Appendix at 9a-10a, 27a, *Armstrong v. Accrediting Council for Continuing Education and Training*, 84 F.3d 1452 (D.C. Cir. 1996). On remand, the district court decided to exercise supplemental jurisdiction. *Armstrong v. Accrediting Council for Continuing Education & Training*, 950 F. Supp. 1

(...continued)
that the evidence was sufficient to show that the school was not properly accredited, but concluded that other factual issues precluded summary judgment in favor of petitioner and members of the class. *See Armstrong v. Accrediting Council for Continuing Education & Training*, 961 F. Supp. 305 (D.D.C. 1997). The accrediting agency subsequently settled the class claim.

(D.D.C. 1996). The court granted defendants' motions to dismiss again in 1997, but did not reach the issue of preemption of the District statute because it agreed with defendants that a choice of law clause in the loan contract allowed the lenders to avoid the District's consumer protection laws. Appendix at 29a-35a.

On appeal, the District of Columbia Circuit held that federal law preempted the District's consumer protection statute because "in the late 1980s" there was a federal policy that "protected lenders from such defenses" unless their loan making activities constituted an "origination relationship" under federal law. Appendix at 2a, 4a-5a. Under this purported federal policy, "origination" as defined by the Department, was the only situation in which borrower defenses were preserved. *Id.* at 5a. State laws, like D.C. Code 28-3809(a) were preempted, according to the Circuit Court, because they apply to situations that do not necessarily satisfy the federal definition of origination and, therefore, "would extend lender liability beyond school origination relationships." *Id.* at 16a-17a.

The District of Columbia Circuit's opinion, which was significantly amended in an order denying reconsideration, asserted that the source of this preemptive federal policy was the FTC staff's decision not to enforce the FTC Holder Rule with respect to student loans during the period from 1982 to 1992.[11] The Secretary of Education's Brief represented that the

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[11] The panel's initial decision identified the TILA as "the source of the Holder Rule," Appendix at 12a, and characterized the 1982 TILA Amendments as a congressional effort "[t]o further encourage private lenders to make vocational school student loans." *Id.* at 4a. The reconsideration motion noted that these assumptions were erroneous, because the Holder Rule was issued pursuant to the FTC's authority under

(continued...)

FTC staff had stopped enforcing the Holder Rule after the 1982 TILA Amendments. *See Id.* at 21a, 22a. The Circuit Court maintained that "[e]nding enforcement of the Holder Rule with respect to GSLP loans," not only ended federal enforcement actions, but had "the effect of protecting lenders from claims and defenses students could raise against their schools," unless the lender fell within the Department of Education's "origination policy." *Id.* 4a-5a. This preemptive policy ended by 1992, under the Circuit Court's theory, because in 1991 "the FTC renewed enforcement of the Holder Rule with respect to GSLP loans," and the Secretary of Education subsequently included language from the Holder Rule in the standard loan notes. *Id.* at 6a. According to the District of Columbia Circuit, during the ten years prior to 1992, the FTC staff's decision not to enforce the FTC Holder Rule created an "actual conflict" between state and federal law that preempted state laws like D.C. Code 28-3809(a) "so long as the lenders avoided school-origination relationships." *Id.* at 5a.[12]

(...continued)
Section 5 of the FTC Act, see 40 Fed. Reg. 53,506, 53,523 (1975) (identifying 15 U.S.C. § 41 *et seq.*, as the source of the Holder Rule), and the legislative history of the 1982 TILA Amendments indicates that the purpose of the amendments was to eliminate duplicative disclosure requirements. The panel denied reconsideration, but it amended the opinion by deleting the passages quoted above and replacing the initial opinion's references to an FTC "nonenforcement policy" with references to the government's representation that there was a FTC staff *decision* to stop "enforcing the Holder Rule with respect to GSLP loans." Appendix at 20a-22a.

[12] Although defendants-appellees argued below that D.C. Code 28-3809 was preempted by federal law, the contention that a pre-1992 federal policy to preempt state law emerged from the FTC staff's decision not to enforce the Holder Rule or, alternatively, from the 1982 TILA Amendments that triggered the FTC staff's decision, was first advanced in the Circuit Court's (continued...)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Circuit Court's preemption ruling is inconsistent with this Court's decisions. This Court's decisions have emphasized that the "actual conflict" required for preemption does not exist merely because federal law permits conduct or does not provide the same remedies as state law. To the contrary, conflict preemption must be based on an affirmative federal mandate or objective that would be significantly frustrated by state law. No such mandate exists here. Instead, the Circuit Court's decision displaces important state law protections based on a federal decision not to enforce an analogous federal rule.

In addition, this Court should grant certiorari to resolve the inconsistent decisions by the lower courts on this issue. Although the preemption issue has been percolating through the lower courts for more than a decade, the decisions have become increasingly fractured and confused, and this Court should resolve the important and recurring issue of whether state laws that protect borrowers under the student loan program are preempted.

I. THE RULING BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS ON PREEMPTION OF STATE LAW.

The Circuit Court's preemption ruling asserts that, because federal authorities decided not to enforce a FTC Rule preserving borrower defenses, state laws that provide analogous remedies are preempted. This reasoning is wholly inconsistent with this Court's decisions, which make clear that the state law is not preempted simply because federal authorities decide to

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[12](...continued)
opinion. We are not aware of any other decisions that adopt this approach to preemption.

stop enforcement of, or even repeal, analogous federal regulations.

A. The District of Columbia Circuit's preemption ruling is inconsistent with *Puerto Rico Consumer Affairs Dep't v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). In that case, oil companies argued that a federal law eliminating federal regulation of gasoline production preempted state laws that imposed price controls after the federal controls expired. This Court unequivocally rejected the argument, and emphasized that the elimination of the federal legislation, with no statutory mandate restricting state authority, could not provide a basis for preemption. *Id.* at 501.

Isla Petroeum shows that the decision below is erroneous in two respects. First, it emphasizes that "[t]here is no federal pre-emption in vacuo, without a constitutional text or federal statute to assert it." *Id.* at 503. Unless there is a statute or regulation that can "plausibly be interpreted as *prescribing* federal preemption it is impossible to find that" federal law displaces state law. *Id.* at 501. The Circuit Court's decision below, however, does not identify any affirmative statutory or regulatory mandate as the basis for preempting state laws. To the contrary, the Circuit Court attributes preemption to a decision by FTC staff not to enforce the Holder Rule, even though the FTC staff has no statutory or regulatory authority to preempt state law through informal enforcement decisions.

Second, *Isla Petroleum* makes clear that a federal decision to recede from regulating a particular area does not implicitly preempt states laws concerning the same issue. In contrast, the Circuit Court's opinion, as amended, finds preemption in a decision by the FTC staff to discontinue enforcement of the FTC Holder Rule. Appendix at 4a, 20a-21a. If, as *Isla Petroleum* holds, the elimination of federal legislation is not sufficient to preempt state law, *a fortiori*, a

decision by agency staff to stop enforcement of a federal rule certainly does not preempt all comparable state law. Indeed, by concluding that an informal agency decision to not enforce a federal rule preempts state law, the Circuit Court's decision here is even more extreme than the reliance on legislative change that this Court found to be erroneous in *Isla Petroeum.*

Some respondents argued below that the 1982 TILA Amendments exempted student loans from the FTC Holder Rule. Appendix at 12a.[13] Respondents may argue that these 1982 Amendments also provide the federal mandate that supports the District of Columbia Circuit's ruling that state law protecting borrower defenses was preempted until 1992 (although they did not present such an argument below). This contention, however, is equally inconsistent with *Isla Petroleum*. Just as the elimination of federal price control legislation did not provide a basis for preempting state regulation, even if Congress decided to exempt student loans from the Holder Rule, this decision would not preempt state laws that provide similar relief. Moreover, there is no indication in the 1982 TILA Amendments or even in their legislative history, that Congress intended to preempt state laws allowing borrowers to raise misconduct by schools who arrange loans on behalf of lenders as a defense. *See* S. Rep. No. 536, *supra* at 42 (stating that exemption was intended to eliminate duplicative paperwork); 128 Cong. Rec. 19,916-17 (Aug. 9, 1982) (remarks of Rep. Heinz introducing original bill).

Consequently, the District of Columbia Circuit's decision is inconsistent with *Isla Petroleum* regardless of whether the 1982 TILA Amendments did, or did not, exempt student loans from the Holder Rule. We believe that the better view is that the Holder Rule applies to student loans, as the

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[13] Notably, the Secretary of Education did not make this argument below.

FTC staff has concluded in detailed opinion letters. *Id.* at 87a-90a, 93a. Moreover, student loans fall within the literal language of the Holder Rule, despite the 1982 TILA Amendments, *see* D. Pridgen, CONSUMER CREDIT AND THE LAW § 14.06[4][b] (1998) , and two district court decisions that have analyzed the issue in detail conclude that the 1982 TILA Amendments did not alter the scope of the Holder Rule. *See Morgan v. Markerdowne Corp.*, 976 F. Supp. 301, 311 (D.N.J. 1997) (citing *Jackson v. Culinary School of Washington*, 788 F. Supp. at 1249-51). However, regardless of whether the decision to discontinue application of the FTC Holder Rule was legislative or administrative, that decision should not preempt state laws unless accompanied by statutory or regulatory text that indicates a "clear and manifest" mandate to preempt state laws. *Isla Petroleum*, 485 U.S. at 500-01. No such text or mandate is present here.

B. The Circuit Court's preemption ruling here is also inconsistent with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), in which this Court held that "the absence of a federal standard cannot implicitly extinguish state common law." *Id.* at 282. In *Myrick*, the petitioner argued that because the National Traffic and Motor Vehicle Safety Act gave the Secretary of Transportation authority to establish a standard requiring antilock braking systems (ABS), and no standard was in effect, a state tort action alleging that the company's failure to use ABS was negligent was preempted because it was implicitly in conflict with federal law. This Court unequivocally rejected the argument, observing that there could be no conflict with federal law because the only relevant federal standard had been suspended. "First, it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard," and, second, there is no frustration of federal purposes because "[i]n the absence

of a promulgated safety standard the act simply fails to address the need for ABS devises at all." *Id.* at 289.

As in *Myrick*, there is no federal standard to create a conflict here. The decision by the FTC staff to not enforce the Holder Rule, at most, suspends the federal rule until enforcement resumes; it does not create a preemptive conflict with state law. Moreover, other provisions of federal law do not impose a federal standard. Neither the HEA nor GSLP regulations set forth the defenses that may be raised on student loans. Indeed, the Secretary of Education has affirmatively decided not to adopt regulations that would impose a federal standard. *See* 57 Fed. Reg. 60,304 (1992). There is also no statutory or regulatory mandate that lenders use schools as their agents for marketing loans. *See* Appendix at 3a, 7a (observing that lenders may limit their cooperation with schools to certain obligations mandated by the HEA and regulations). The Circuit Court's ruling in this case improperly preempts state law based solely on the absence of federal enforcement.

C. This Court's decisions also teach that "[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above what is authorized by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989). In *California v. ARC America Corp.*, this Court held that state laws allowing indirect purchasers to bring antitrust actions that are not allowed under the Sherman Act are not preempted because nothing in federal law indicates that Congress intended to preclude states from authorizing antitrust remedies that went beyond those provided by federal law. In *English v. General Electric Corp.*, 496 U.S. 72 (1990), this Court held that statutory provisions that provide a federal remedy for whistle blowers who report violations of nuclear safety standards do not preempt state laws that provide exemplary damages and other benefits not available under federal law because there was no indication of "a clear

congressional purpose to supplant state law causes of action that afford broader relief." *Id.* at 88; *see also California v. Zook*, 336 U.S. 732, 733 (1948) (California law that provides a remedy that addresses the same conduct as federal remedy, but differs in details, is not preempted because "normally congressional purpose to displace local laws must be clearly manifested.").

The ruling below is inconsistent with these precedents. The federal remedies for the conduct at issue here are administered by federal agencies. The FTC has the authority to bring actions to enforce the Holder Rule under 15 U.S.C. §§ 45, 57b, but there is no private action for enforcement. *See Hollowary v. Bristol-Meyers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973). Similarly, the HEA authorizes the Secretary and guarantee agencies to bring remedial actions against schools for misrepresentation. *See* 20 U.S.C. § 1094(c) (1988); 34 C.F.R. §§ 668.71-.75, 682.700-.710 (1988). However, nothing in the HEA or the FTC Holder Rule even remotely suggests that remedies provided under federal law are *exclusive*, or that these remedies displace state laws that otherwise protect the rights of defrauded borrowers. The state laws at issue here, consumer protection statutes preserving borrower defenses on consumer loans, simply go beyond federal law on matters that are traditionally governed by state law. *See California v. Zook*, 336 U.S. at 734 (protection from fraud is among traditional state policy powers where presumption against preemption applies). This Court's cases make clear that such state laws are not preempted merely because they provide remedies that are not found in federal law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-496 (1996) (state common law action based on violation of federal standard is not "different from" federal law in a manner that justifies preemption).

D. This Court's decisions also recognize that courts should be reluctant to find preemption where state law protects

"legitimate and important state interests" that Congress may have contemplated would be protected by state law. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 599 (1974). State law generally serves as the primary source of law defining contractual rights and protecting against fraud. By holding that these protections are preempted because a federal rule addressing the same issues was not being enforced, the ruling below requires defrauded student loan borrowers to repay otherwise unenforceable loans, and allows lenders to use schools that defraud borrowers with impunity. As the District of Columbia Circuit observed, the results seem unfair, since lenders that permit schools to abuse the loan program are permitted to profit at the expense of the very students whom the loan program was intended to benefit. Appendix at 18a.

The Circuit Court's willingness to find such broad preemption of state protections is inconsistent with this Court's decisions holding that a federal interest in encouraging private transactions is not sufficient to preempt all state laws that may encumber those transactions. *See, e.g., United States v. Kimbell Foods*, 440 U.S. 715, 729-740 (1979) (federal interest in collecting small business loans does not warrant displacing state law); *United States v. Yazell*, 382 U.S. 341, 353(1966) (federal law governing small business loans does not justify overriding state laws "which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes."); *Wallis v. American Petroleum Corp*, 384 U.S. 63, 68-70 (1966) (federal interest in assignability of leases under the Mineral Leasing Act does not preempt state law). The HEA is not a regulatory program, but seeks to create incentives for student loans by paying interest subsidies and providing insurance against defaults by borrowers. Nothing in the HEA, however, indicates that Congress intended to provide additional subsidies to lenders by allowing them to use unscrupulous agents to market their loans, or by requiring borrowers to bear losses from school misconduct that would be borne by lenders

if the loan was not reinsured by the federal government. To the contrary, the origination regulations suggest that lender delegation of loan making responsibilities to schools is tolerated, but discouraged. *See* 34 C.F.R. § 682.206. In addition, where Congress intended to free lenders from state laws that might hamper loan collection, like the statute of limitations, it did so explicitly. *See supra* at 5 (listing express preemption provisions). Congress' enactment of such specific preemption provisions "implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (plurality opinion); *accord id.* at 533 (Blackmun, J., concurring and dissenting in part). The HEA's mandate to encourage lenders to make student loans is not a mandate to protect lenders "at all costs." *Pacific Gas & Electric v. Energy Resources Comm'n*, 461 U.S. 190, 223 (1983).

II. THE LOWER COURTS' DECISIONS ON PREEMPTION OF STATE LAW UNDER THE STUDENT LOAN PROGRAM ARE INCONSISTENT.

The preemption issues in this action potentially arise in the collection of hundreds of millions of dollars in student loans. The law on these issues, however, has grown increasingly fractured as the lower courts have issued inconsistent decisions. Although the decisions do not present Circuit Court holdings in direct conflict, the divergent decisions emerging from the lower courts show that it is important for this Court to address this recurring issue.

The District of Columbia Circuit's preemption ruling in this case is inconsistent with the rationale of the Seventh Circuit's 1990 opinion in *Veal v. First American Savings Bank*, 914 F.2d 909, which states that state law defenses are not preempted. Like *Armstrong*, *Veal* involved student loan borrowers who sought to challenge the enforceability of their

student loans because the school that they attended fraudulently induced them to enroll. *Id.* at 911. The Seventh Circuit held that the students had failed to state a claim for relief because the Federal regulations upon which they relied, 34 C.F.R. §§ 682.512, 682.513, and the FTC Holder Rule, did not apply to their student loans, and because the state statute that they cited did not make the loan subject to defenses based on misconduct by the school. *Id.* at 914. Although the district court had ruled that the borrowers' claims were preempted, *id.* at 911, the Seventh Circuit did not endorse this ruling and added a footnote stating that, if sued by a lender in state court, the borrowers "would be entitled to assert any defenses available under state law that are applicable to his or her particular loan." *Id.* at 914-15 n.7.

The only other Circuit Court decision addressing preemption holds that federal law preempts state law, but its reasoning is inconsistent with the District of Columbia Circuit's decision here. In an unpublished decision issued shortly after *Armstrong,* the Eleventh Circuit held that state law is preempted if it is based on conduct that is "mandated *or contemplated by the HEA.*" *Eddie Bartels, et al. v. Alabama Commercial College, et al.*, No. 98-8885, slip. op. at 7 (11th Cir., June 29, 1999), 1999 U.S.App. LEXIS 19902 (italics added). Because federal law "expressly permits lenders to delegate lender functions to schools with which they enter into 'origination relationships,'" the Circuit Court concluded the "the Georgia law of agency and any other applicable state laws" are preempted to the extent they impose liability on loan holders for the "school's acts as purported agents of the lenders." *Id. Bartels* is inconsistent with the District of Columbia's opinion in this case because the Eleventh Circuit concluded that the HEA preempts state agency even when the school acts as agent for the lender in an "origination" relationship. *Id.* at 7-9 &n.7. The District of Columbia

Circuit's ruling below, however, states that school-originated loans are not subject to preemption, even if made during the 1982-1992 period, because the Department of Education had issued statements that endorsed the view that borrower defenses are preserved when the school acts as agent for the lender. Appendix at 5a.

The Arkansas Supreme Court has held that state claims are preempted where "it would be an impossibility for [lenders] to comply with the dictates of the HEA and not incur liability under state law." *Bogart v. Nebraska Student Loan Program*, 313 Ark. 656, 858 S.W.2d 78, 81 (1993); *accord Tipton v. Secretary of Education*, 768 F.Supp. 540 (S.D.W.Va. 1991) (concluding that state claim under West Virginia statute was preempted because court believed that state statute attached liability to actions by banks that are "expressly dictated by the federal act and regulations"). The District of Columbia's ruling here, however, goes farther because it concludes that state law is preempted not only when federal requirements make compliance with state and federal law impossible, but when federal law *permits* the conduct at issue.

The district court decision in *Morgan v. Markerdowne Corp.*, 976 F. Supp. 301 (D.N.J. 1997), illustrates how lower courts have struggled with the preemption issue. *Morgan* accepts the argument that state law may be impliedly preempted because it imposes liability greater than the liability imposed by federal law, but observes that state laws that provide the same relief as the FTC Holder Rule are not inconsistent with federal law. *Id.* at 319. Consequently, the district court held that state law defenses that are "equivalent to, but no more extensive than, existing federal defenses" set forth in the FTC Holder Rule are not preempted. *Id.* Thus, while the District of Columbia Circuit construed the FTC's decision not to enforce the Holder Rule as an affirmative basis for preemption, *Morgan* concludes that the Holder Rule reflects

a federal policy that exempts from preemption state laws that provide the same relief as federal law.

While these decisions do not show a classic conflict between the Circuits, they demonstrate that no coherent analysis of the preemption issue has emerged, despite the importance of this issue as a matter of federal law. This Court should grant certiorari to correct the District of Columbia's erroneous analysis and resolve the conflict among the federal courts.

CONCLUSION

This Court should issue a writ of certiorari to review the District of Columbia Circuit's rulings that federal law preempts the application of state laws preserving borrower defenses to federally reinsured student loans.

Respectfully submitted,

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September 2, 1999

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NO. 99-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

VANESSA ARMSTRONG,
Petitioner,

v.

ACCREDITING COUNCIL FOR CONTINUING EDUCATION AND TRAINING, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

PETITIONER'S APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 2, 1998 Decided March 23, 1999

No. 97-5316

Vanessa Armstrong,
Appellant

v.

Accrediting Council for Continuing Education and
Training, Inc., et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 91cv03135)

Michael E. Tankersley argued the cause for appellant. With him on the briefs was *Alan B. Morrison*.

Anthony M. Alexis, Assistant U.S. Attorney, argued the cause for appellee Accrediting Council for Continuing Education & Training, Inc., et al. With him on the brief were *Wilma A. Lewis*, U.S. Attorney, *R. Craig Lawrence* and *Scott S. Harris*, Assistant U.S. Attorneys.

Henry S. Weinstock argued the cause and filed the brief for appellees Bank of America, N.T. & S.A., et al.

Mark E. Shure argued the cause and filed the brief for appellee Educational Credit Management Corporation.

Before: HENDERSON, RANDOLPH and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Concurring statement filed by *Circuit Judge* HENDERSON.

TATEL, *Circuit Judge*: In this case, we must decide whether appellant, a student who attended a for-profit vocational school with help from a federally guaranteed student loan, may assert the school's alleged fraud and failure to provide the education it promised as a defense against the lender's effort to collect the loan. Although federal student loan policy now recognizes school misconduct defenses against lenders who have "referral relationships" with for-profit schools, appellant obtained her loan in the late 1980s, a time when federal policy protected lenders from such defenses. Because we find no basis for applying the new standards retroactively to appellant's loan, we affirm the district court's dismissal of her claims for declaratory and injunctive relief.

I

Established by the Higher Education Act of 1965, the Guaranteed Student Loan Program provides interest rate subsidies and federal insurance for private lenders to make student loans. *See* 20 U.S.C. § 1078(a), (c) (1994).* To raise

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* The Guaranteed Student Loan Program has since been renamed the Federal Family Education Loan Program. *See* Higher Education Act Amendments of 1992, Pub. L. No. 102-325, sec. 411(a)(1), § 1071, 106 Stat. 448, 510. Throughout this opinion, we refer to the program as the GSLP, its name at the time appellant borrowed in 1988; where relevant, we cite

funds to make, i.e. "originate," additional loans, original lenders sell loans to other lenders on a secondary loan market. So-called "guaranty agencies" guarantee the loans, paying loan holders the amounts due and taking assignment of the loans if students default. *See id.* § 1078(c). The Secretary of Education "reinsures" the loans and ultimately reimburses guaranty agencies on a sliding scale. *See id.* § 1078(c)(1). Although guaranteed student loans often change hands many times, they are not considered negotiable instruments; neither repurchasers nor assignees become "holders in due course." *See Jackson v. Culinary Sch.*, 788 F. Supp. 1233, 1248 n.9 (D.D.C. 1992), *rev'd on other grounds*, 27 F.2d 573 (D.C. Cir. 1994), *vacated*, 515 U.S. 1139, *on reconsideration*, 59 F.3d 354 (D.C. Cir. 1995). Instead, subsequent holders assume loans subject to all claims and defenses available against original lenders. *Cf.* 34 C.F.R. § 682.508(c) (1988).

Students may use federally guaranteed student loans to attend "eligible" schools, including for-profit vocational schools. *See* 20 U.S.C. § 1085(a)(1) (1988). To establish eligibility, vocational schools must be accredited by a nationally recognized accrediting agency. *See id.* § 1085(c)(4). The Secretary requires eligible schools to perform certain functions to facilitate student access to guaranteed loans, including giving students information on loan availability, certifying student eligibility to participate in the federal loan program, and forwarding applications to lenders. *See* 34 C.F.R. §§ 668.41-.43, 682.102(a), 682.603 (1988).

Federal student loan policy has undergone two significant changes relevant to this case. The first began in 1979 when Congress amended the Higher Education Act to encourage

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law in effect in 1988.

lenders to market loans to for-profit vocational school students. *See* Higher Education Technical Amendments of 1979, Pub. L. No. 96-49, 93 Stat. 351. The 1979 amendments removed a ceiling on the federal interest subsidy paid to participating GSLP lenders, "making proprietary school loans, which had previously been considered as too risky, more attractive." S. Rep. No. 102-58, at 6 (1991) ("Senate Report"). Later amendments removed other limitations on student borrowers attending for-profit schools, increased aggregate loan limits, and allowed students who had not completed high school to use GSLP loans to attend accredited postsecondary schools. *See* Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367; Higher Education Amendments of 1986, Pub. L. No. 99-498, sec. 425, § 1075(a), 100 Stat. 1268, 1359; *id.* sec. 481, § 1088, 100 Stat. 1268, 1476.

To further encourage private lenders to make vocational school student loans, Congress excluded GSLP loans from the Truth in Lending Act ("TILA"). *See* Pub. L. No. 97-320, sec. 701(a), § 1603, 96 Stat. 1469, 1538 (1982). As a result, the Federal Trade Commission stopped enforcing various TILA regulations against GSLP lenders, including the "Holder Rule." Adopted by the FTC in 1976, the Holder Rule requires purchase money loan agreements (loans supplying money for the purchase of goods or services) arranged by sellers to contain a notice to all loan holders that preserves the borrower's ability to raise claims and defenses against the lender arising from the seller's misconduct. *See* 16 C.F.R. § 433.2(a) (1998). For example, if a used car dealer who fraudulently sells a lemon also arranges the buyer's financing through a bank, the buyer may rely on the dealer's fraud as a defense against repaying the bank loan. Ending enforcement of the Holder Rule with respect to GSLP loans thus had the effect of protecting lenders from claims and defenses students could raise against their schools.

This lender protection from student suits had one major exception: where lenders delegated to schools "substantial functions or responsibilities normally performed by lenders before making loans." 51 Fed. Reg. 40,890 (1986); 34 C.F.R. § 682.206(a)(2) (1988). In such cases, the Department of Education's "origination policy" kicked in, treating the schools—not the banks—as the lenders that had effectively made the original loans. *See* 34 C.F.R. § 682.200(b) (1988). As a result, all subsequent loan holders (remember, there are no holders in due course) were subject to claims and defenses that students could raise against their schools. *Cf. id.* § 682.508(c). But so long as lenders avoided school- origination relationships, they could make and sell loans without fear that students could assert school misconduct as a defense against repaying their loans.

These changes in the Guaranteed Student Loan Program accomplished their purpose. Lending to for-profit school students mushroomed, increasing more than six-fold between 1982 and 1988. *See* Senate Report at 6-7. The changes also had unintended consequences. As a result of the GSLP's easy source of funding, large numbers of for-profit schools sprang up, admitted poorly prepared students, and offered shoddy programs. *See id.* at 2-3, 8-13. Graduates of these schools were often unable to get jobs. Default rates climbed dramatically, rising as high as 39%. *See id.* at 2. Because loan guaranty agencies were unable to keep up with growing default rates, many had to be bailed out by the Secretary. *See, e.g., id.* at 22.

In order to curb high default rates and protect students from for-profit school abuses, Congress initiated a second round of changes to the Guaranteed Student Loan Program in 1992. One change directed the Secretary to terminate GSLP eligibility of for-profit schools with consistently high default

rates. *See* Pub. L. No. 102-325, sec. 427(a), § 1085, 106 Stat. at 549 (redefining "eligible institution" to exclude schools with excessive default rates). As a result, many for- profit schools were eliminated from the program.

Congress also directed the Secretary to develop a "Common Guaranteed Student Loan Application Form and Promissory Note" specifying the contractual terms governing guaranteed student loans, and to study the possibility of permitting students to raise fraud-based state law defenses against repayment of student loans. *See id.* § 425(e), 106 Stat. at 546; *id.* § 1403, 106 Stat. at 817. Responding to these directives, the Secretary prepared a common promissory note and included in it a provision modeled on the FTC Holder Rule that was directed specifically at lenders affiliated with for-profit schools. *See* U.S. Dep't of Educ., Application and Promissory Note for Federal Stafford Loans (Subsidized and Unsubsidized) and Federal Supplemental Loans for Students (SLS) (1993) ("Common Promissory Note"). In fact, one year earlier the FTC had renewed enforcement of the Holder Rule with respect to GSLP loans. *See, e.g.*, Letter from Jean Noonan, Associate Director for Credit Practices, Federal Trade Commission, to Jonathan Sheldon, National Consumer Law Center (July 24, 1991) ("FTC Opinion").

Treating GSLP lenders like banks that allow used car dealers to arrange financing, the Holder Rule notice the Secretary included in the common promissory note, together with the FTC's renewed enforcement policy, made GSLP loan holders "subject to all claims and defenses" that the student borrower could raise against the school. Common Promissory Note. The notice applies where the loan is "used to pay tuition and charges of a for-profit school that *refers* loan applicants to the lender or that is affiliated with the lender by common control, contract or business arrangement." *Id.* (emphasis

added). According to the Department, "refers" means that a school, with a lender's knowledge, goes beyond "giv[ing] its students *information* on the availability of student loans" and "recommend[s] that the applicants seek loans from [a particular] lender." U.S. Dep't of Educ., Overview, Federal Trade Commission (FTC) Holder Rule 2, 3 (July 2, 1993) ("Overview, FTC Rule"). A school also "refers" loan applicants when it "contact[s] a particular lender to inquire whether that lender would be willing to make loans for *its own students*, and later include[s] this lender (if it responded positively) on its information list of lenders." *Id.* at 2. No referral relationship exists where a school simply "obtain[s] its lender information from third-party sources ... or from a more generalized school inquiry to a lender (*e.g.*, asking merely whether the lender is generally willing to make loans to trade school students in a particular state.)." *Id.* Although the common promissory note's Holder Rule notice expands lender liability beyond that authorized by the Department's origination policy, the Department has made clear that even under the notice's lower threshold lenders may protect themselves from school misconduct defenses by limiting their cooperation with schools to the few obligations mandated by the Higher Education Act and implementing regulations (i.e., providing students with information on loan availability, certifying student eligibility, and forwarding applications to lenders). *See* Dep't of Educ., Federal Trade Commission (FTC) Holder Rule: Questions/Answers 4 (July 27, 1993); 34 C.F.R. § 682.206 (1997).

The loan at issue in this case was made in 1988, during the time when federal student loan policy encouraged lenders to make GSLP loans to vocational school students and prior to inclusion of the Holder Rule notice in GSLP promissory notes. Appellant Vanessa Armstrong was recruited by National Business School, a for-profit vocational school operating in